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APPLICATION OF SOUTHWESTERN ELECTRIC POWER COMPANY FOR AUTHORITY TO CHANGE RATES	**§ § §**	**BEFORE THE STATE OFFICE OF ADMINISTRATIVE HEARINGS**

TEXAS INDUSTRIAL ENERGY CONSUMERS' EXCEPTIONS TO THE PROPOSAL FOR DECISION

[REDACTED]

October 7, 2021

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GLOSSARY OF ACRONYMS

ADFIT	Accumulated Deferred Federal Income Taxes
AEP	American Electric Power
AFUDC	Allowance for Funds Used During Construction
ALJ	Administrative Law Judge
BTMG	Behind the Meter Generation
CARD	Cities Advocating Reasonable Deregulation
CCOSS	Class-Cost-of-Service Study
CoL	Conclusion of Law
EECRF	Energy Efficiency Cost Recovery Factor
FERC	Federal Energy Regulatory Commission
FoF	Finding of Fact
GCRR	Generation Cost Recovery Rider
IRP	Integrated Resource Plan
MW	Megawatt, a unit of power
O&M	Operations and Maintenance
OATT	Open Access Transmission Tariff
OPUC	Office of Public Utility Counsel
PFD	Proposal For Decision
PPA	Purchased Power Agreement
PUC, or the "Commission"	Public Utility Commission of Texas
PURA	Public Utility Regulatory Act, Tex. Util. Code §§ 11.001 *et seq.*
ROE	Return On Equity
SPP	Southwest Power Pool
SWEPCO	Southwestern Electric Power Company
TIEC	Texas Industrial Energy Consumers

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TEXAS INDUSTRIAL ENERGY CONSUMERS' EXCEPTIONS TO THE PROPOSAL FOR DECISION

I. INTRODUCTION

Texas Industrial Energy Consumers (TIEC) commends the Administrative Law Judges (ALJs) for their careful and professional attention to this case and their thorough presentation of the issues in the Proposal for Decision (PFD). TIEC is not filing exceptions on all of the issues on which the PFD did not adopt TIEC's position. Instead, TIEC's exceptions are limited to the handful of issues addressed below.

As an initial matter, TIEC recommends the removal of certain dicta in the text of the PFD relating to the Commission's authority to resolve conflicting interpretations of a Federal Energy Regulatory Commission (FERC) tariff. This issue was initially raised because Southwestern Electric Power Company (SWEPCO) asserted in discovery responses that $5.7 million of transmission costs were based on additional payments to SPP resulting from SWEPCO's new interpretation of a FERC tariff.[1] As the PFD finds, however, the $5.7 million does not reflect any additional payments to SPP, and there is nothing in the record to indicate what amount, if any, SWEPCO actually paid to SPP as a result of the new interpretation.[2] Rather, the $5.7 million results from an erroneous addition of demand to the Texas allocators for all transmission costs, including those that have nothing to do with SPP or any SPP tariff.[3] Accordingly, the PFD's discussion of the Commission's jurisdiction to resolve conflicting interpretations of a FERC tariff is unnecessary to the decision in this case and, as discussed below, could be read to impose new

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[1] TIEC Ex. 76.

[2] PFD at 195.

[3] *See* Tr. at 1210:22-1213:8 (Aaron Cross) (May 25, 2021).

limits on the Commission's authority. It is pure dicta and should not be included in the Commission's final order in this case.

Another important issue in this case is establishing the proper return on equity (ROE) for SWEPCO. The PFD takes a step in the right direction by recommending that SWEPCO's currently authorized ROE of 9.6%[4] be reduced to 9.45%.[5] However, this modest reduction does not go far enough to reflect the reality of current market conditions, in which capital costs are persistently low and declining. For example, interest rates have declined by more than 100 basis since SWEPCO's last rate case, but the PFD proposes only a 15 basis point reduction to SWEPCO's ROE.[6] TIEC requests that the Commission adopt an ROE of 9.15%, as recommended by its witness Michael Gorman.[7]

TIEC also addresses an issue of increasing significance: the proper allocation of costs under renewable Purchased Power Agreements (PPAs). SWEPCO has four wind contracts under which it incurred costs during the test year.[8] SWEPCO recovers all of the costs from these contracts through fuel (on an energy basis) and none of the costs through base rates (on a demand basis).[9] It is undisputed that these contracts have accredited capacity from the Southwestern Power Pool (SPP),[10] and that SWEPCO relies on that capacity in its system planning.[11] And, under the Commission's rules, capacity- and demand-related costs cannot be recovered through fuel.[12] Accordingly, the Commission should approve TIEC's proposed adjustment to remove the portion

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[4] *Application of Southwestern Electric Power Company for Authority to Change Rates*, Docket No. 46449, Order on Rehearing at FoF 158 (Mar. 19, 2018).

[5] PFD at FoF 97.

[6] TIEC Ex. 46.

[7] TIEC Ex. 3, Direct Testimony and Exhibits of Michael P. Gorman at 5 (Gorman Dir.).

[8] TIEC Ex. 4, Direct Testimony and Exhibits of Billie S. LaConte at 23 (LaConte Dir.).

[9] SWEPCO Ex. 47, Rebuttal Testimony of Jason M. Stegall at 11 (Stegall Reb.).

[10] *Id.* at 23-24.

[11] *Id.* at 24; Tr. at 663:15-18 (Stegall Cross) (May 21, 2021).

[12] 16 T.A.C. § 25.236(a)(6).

of these contracts that reflect capacity value from fuel and order that this amount instead be recovered through base rates on a demand basis.

Finally, TIEC raises several other issues, including a potential clarification to the Excess ADFIT refund and a recent judgment from the Third Court of Appeals that would impact the proper rates to be set in this case.[13]

V. RATE BASE/INVESTED CAPITAL [PO ISSUES 4, 5, 10, 11, 12, 13, 14, 15, 16, 18, 19, 20, 21, 22, 23, 36, 37, 38, 39, 40, 41, 50, 67, 68, 69, 70, 71]

C. Accumulated Deferred Federal Income Taxes [PO Issue 20]

2. Excess ADFIT

The PFD recommends refunding the excess ADFIT balance available to return to customers by first crediting it against any amounts owed by customers because of the March 18, 2021 relate-back, and then refunding the remaining amounts through a rider over six months.[14] TIEC raises two points of clarification regarding how this recommendation should be implemented when the surcharge amounts are calculated. First, the PFD does not recommend a specific class allocation methodology for the refund. TIEC witness Mr. Pollock proposed that it be allocated to rate classes in proportion to the amount of allocated ADFIT in the class cost of service study (CCOSS).[15] No party opposed that recommendation, and TIEC requests that it be specified in the order in this case rather than left to a future proceeding.

Second, regardless of what allocation methodology the Commission utilizes, it should apply any excess ADFIT credits to relate-back surcharge amounts on a class-by-class basis. The excess ADFIT represents overpayments that ratepayers made as a result of the reduction in the tax rate from the Tax Cut and Jobs Act. Those amounts should be returned to the ratepayers that made

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[13] TIEC notes that the PFD properly rejected SWEPCO's proposed SSGL rate for behind-the-meter generation (BTMG) load. PFD at 311. The PFD did not adopt an alternative recommendation as to how cost allocation, rate design, and moderation should be handled with respect to a BTMG rate if the Commission decides to include BTMG load in the jurisdictional and class allocation studies (which it should not). TIEC's position on those issues are set out in its initial brief at pages 86-89. *See also* TIEC's Reply Br. at 59-62.

[14] PFD at 350, FoF 89.

[15] TIEC Ex. 1, Direct Testimony and Exhibits of Jeffry C. Pollock at 40-41 (Pollock Dir.).

them. Accordingly, if a given class's share of the excess ADFIT balance is $10 million, that class should receive a refund of $10 million (plus any carrying costs) regardless of whether it is slated to receive a $15 million relate-back surcharge in this case on the one hand, or a rate decrease—and thus no surcharge—on the other. In the $15 million example, the $10 million would be credited and the class would be left with a $5 million surcharge. In the rate decrease example, the class would not have a surcharge to credit, but would still receive its $10 million share of the excess ADFIT refund through a rider over six months.[16] TIEC reads the PFD's recommendation on the refund as being consistent with this cost-causation based framework, but notes that a clarification may help avoid any confusion when the surcharge is calculated and the excess ADFIT is refunded. Accordingly, TIEC recommends the addition of the following finding of fact (to be inserted after Finding of Fact 89) for clarification purposes:

- The excess ADFIT refund should be allocated to rate classes in proportion to the amount of allocated ADFIT in the CCOSS, and each rate class should receive its full share of the refund. The application of any excess ADFIT credits against amounts owed because of the relate-back should thus be conducted on a class-by-class basis.

VI. RATE OF RETURN [PO ISSUES 4, 5, 7, 8, 9]

A. Return on Equity [PO Issue 8]

The Commission should adopt TIEC witness Michael Gorman's recommended ROE for SWEPCO of 9.15%.[17] Mr. Gorman's recommendation, like those of the other intervenor and Staff witnesses,[18] reflects the cost of capital under current conditions, which has only decreased since SWEPCO's ROE was set at 9.6% in its last rate case in 2017.[19] Indeed, interest rates have declined in marked fashion since 2017,[20] while authorized ROEs have also declined.[21] Further, SWEPCO's

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[16] PFD at 350, FoF 89.

[17] TIEC Ex. 3, Gorman Dir. at 5.

[18] PFD at 103.

[19] Docket No. 46449, Order on Rehearing at FoF 158.

[20] TIEC Ex. 46.

[21] TIEC Ex. 3, Gorman Dir. at 7.

business and operating risk has also improved as evidenced by, among other factors, the enactment in 2019 of the Generation Cost Recovery Rider (GCRR) statute, which allows SWEPCO to begin recovering its capital investment in a new generation facility on the day the facility goes into service.[22]

The PFD takes a step in the right direction by recommending that SWEPCO's current 9.6% ROE be reduced to 9.45%. However, the PFD's recommendation does not go far enough to fully capture current market conditions, in which the cost of capital has been persistently low and continues to decline. To take one example, interest rates have declined by more than 100 basis points since 2017, but the PFD proposes only a 15 basis point reduction to SWEPCO's current ROE.[23] As detailed in TIEC's briefs, and summarized in the PFD, Mr. Gorman's analyses indicate that an appropriate ROE range for SWEPCO is 8.9% to 9.35%.[24] His recommendation of 9.15% lies at the approximate midpoint of that range, and should be adopted.

- **The cost of capital for utilities, including SWEPCO, has declined significantly since SWEPCO's last rate case.**

The cost of capital for utilities has decreased significantly since SWEPCO's last rate case, as evidenced by the steep decline in what were already low interest rates. This decline can be seen in the following chart from Mr. Gorman's testimony:[25]

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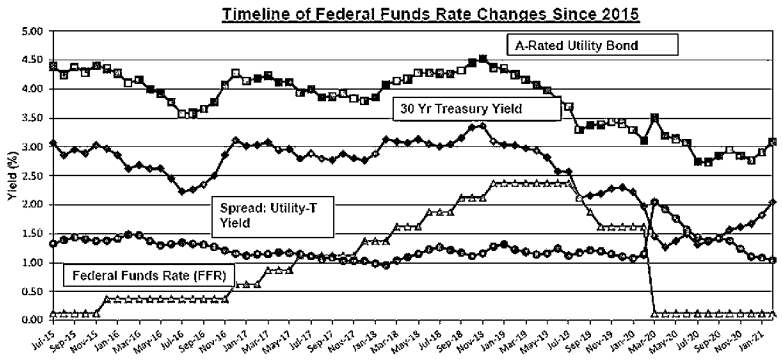
[22] Tr. at 1070:16-23 (D'Ascendis Cross) (May 24, 2021); PURA § 36.213.

[23] TIEC Ex. 46.

[24] TIEC Ex. 3, Gorman Dir. at 54.

[25] *Id.* at 13.

FIGURE 4



Fed FFR Actions:

1	December 2015	0.25	→	0.50	8	September 2018	2.00	→	2.25
2	December 2016	0.50	→	0.75	9	December 2018	2.25	→	2.50
3	March 2017	0.75	→	1.00	10	August 2019	2.00	→	2.25
4	June 2017	1.00	→	1.25	11	September 2019	1.75	→	2.00
5	December 2017	1.25	→	1.50	12	October 2019	1.50	→	1.75
6	March 2018	1.50	→	1.75	13	March 2020	1.00	→	1.25
7	June 2018	1.75	→	2.00	14	March 2020	0.00	→	0.25

Sources:
Federal Reserve Bank of New York, https://apps.newyorkfed.org/markets/autorates/fed-funds-search-page
Board of Governors of the Federal Reserve System, https://www.federalreserve.gov/datadownload/
Moody's Credit Trends, https://creditrends.moodys.com/

As the chart shows, long-term and short-term rates have fallen since 2017, and are currently at near-historic lows.[26] Both 30-year Treasury yields and Aaa-rated corporate bond yields are currently more than 100 basis points lower than what they were during the pendency of SWEPCO's last rate case.[27] Importantly, as Mr. Gorman testified, the current low cost-of-capital environment is expected to continue into at least the intermediate term, as market participants have grown comfortable with the Federal Reserve's actions and low interest rates.[28]

The decrease in the cost of capital is also reflected in utilities' awarded ROEs, though regulatory commissions have lagged behind the steep decline in interest rates in lowering utility ROEs, which underscores the need for authorized ROEs to continue to come down to match market conditions. Mr. Gorman's Figure 1 shows that authorized electric utility ROEs have decreased

[26] *Id.* at 17.

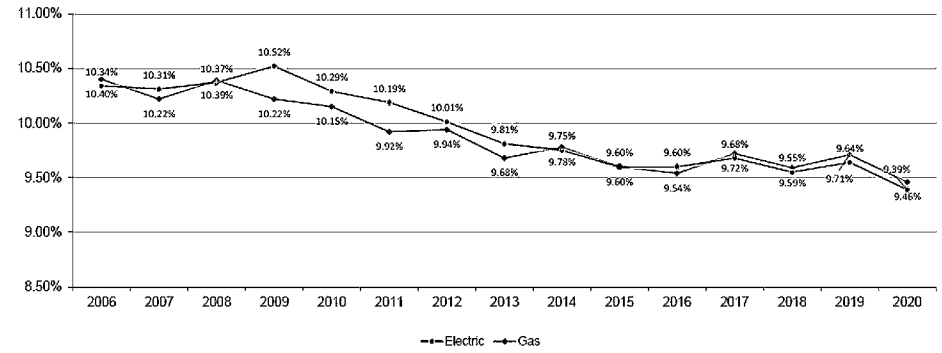
[27] TIEC Ex. 46.

[28] TIEC Ex. 3, Gorman Dir. at 14-15.

since SWEPCO's last rate case in 2017, from an average ROE of 9.68% in 2017 to an average ROE of 9.39% in 2020:[29]

FIGURE 1

Authorized Returns on Equity*
(Exclude Limited Issue Riders)



ROE Distributions[2]

Electric Utilities	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017	2018	2019	2020
<= Average	56.0%	59.5%	51.4%	59.0%	51.7%	55.0%	51.9%	52.4%	57.6%	60.0%	53.1%	60.5%	47.4%	45.5%	33.3%
> Average	44.0%	40.5%	48.6%	41.0%	48.3%	45.0%	48.1%	47.6%	42.4%	40.0%	46.9%	39.5%	52.6%	54.5%	66.7%
Gas Utilities															
<= Average	46.7%	51.4%	50.0%	50.0%	56.4%	31.3%	45.7%	47.6%	50.0%	50.0%	53.8%	70.8%	47.5%	53.1%	52.9%
> Average	53.3%	48.6%	50.0%	50.0%	43.6%	68.8%	54.3%	52.4%	50.0%	50.0%	46.2%	29.2%	52.5%	46.9%	47.1%

Source and Notes:
[1] *S&P Global Market Intelligence*, RRA Regulatory Focus, Major Rate Case Decisions -- January - December 2020, February 2, 2021 at page 1.
[2] Download from S&P Global Market Intelligence, March 18, 2021.
* Electric Returns exclude Limited Issue Rider Decisions.
^ RRA excludes the 2017 Alaska ENSTAR decision from its Industry Average.

Ratings agencies have recognized the decline in authorized ROEs and indicated that they expect it to continue given the low capital-cost environment. In October 2020, Moody's stated that:

> Utility allowed ROEs ***are likely to continue to decline as low interest rates persist*** given the industry's relatively low risk business risk profile, strong monopoly characteristics and the aim of regulators to keep rates affordable. As a result, ***we do not view declining allowed ROEs alone as indicative of weaker regulatory relationships***. . . . Furthermore, mechanisms that reduce regulatory lag and enhance the ability of utilities to earn their authorized ROEs help to mitigate the impact of lower allowed ROEs. For example, in Texas, a new generation cost recovery rider allows non-ERCOT utilities to seek recovery of investments in power generation

[29] *Id.* at 7.

facilities before the facility is in service and start recovering investments beginning on the day the facility is placed in service.[30]

- **Utilities have maintained access to capital despite declining authorized ROEs.**

Consistent with Moody's observation, the evidence shows that utilities have maintained ready access to capital even in a period in which authorized ROEs are declining and expectations are that they will continue to do so. For example, in March of this year, SWEPCO was able to issue a $500 million five-year note at an interest rate of 1.65%.[31] SWEPCO's sister company, AEP Texas, issued a $450 million 30-year bond at an interest rate of 3.45% in May.[32] Notably, AEP Texas was most recently granted an ROE of 9.4% in 2020,[33] and it has the same credit rating as SWEPCO.[34]

Another measure of utilities' low cost of capital is the robust valuations of their securities. As Mr. Gorman testified, "robust valuations are an indication that utilities can sell securities at high prices, which is a strong indication that they can access equity capital under reasonable terms and conditions, and at relatively low cost."[35] This is evidenced by the valuations of utility stocks in the public equity markets. For example, the average price-to-earnings ratio for utility stocks in 2020 was 20.83, which is substantially higher than the long-term average of 16.79.[36] The evidence is clear that regulated utilities, including SWEPCO, are able to access capital on favorable terms in the current economic environment.

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[30] TIEC Ex. 3B, Gorman Conf. Workpapers at MPG Confidential WP 15 (Moody's Investors Service, *2021 Outlook Stable on Strong Regulatory Support and Robust Residential Demand* (Oct. 29, 2020)) at 5.

[31] Tr. at 960:7-11 (Hawkins Cross) (May 24, 2021); TIEC Ex. 63.

[32] Tr. at 960:19-22 (Hawkins Cross) (May 24, 2021); TIEC Ex. 64.

[33] *Application of AEP Texas for Authority to Change Rates*, Docket No. 49494, Final Order at 2 (Apr. 6, 2020).

[34] Tr. at 960:23-961:1 (Hawkins Cr.) (May 24, 2021); TIEC Ex. 6 at Bates 034.

[35] TIEC Ex. 3, Gorman Dir. at 9-10.

[36] TIEC Ex. 3, Gorman Dir. at Exhibit MPG-2 at 1.

- **A 9.15% ROE will allow SWEPCO to attract capital on reasonable terms.**

The PFD's recommended ROE of 9.45% is higher than necessary for SWEPCO to attract capital. This is evident from, among other things, the implied risk premium that would result from the PFD's recommendation. A "risk premium" is the spread between a theoretically risk-free investment (for example, 30-year treasury bond) and an authorized ROE, and it should represent the premium that investors require to invest in a utility rather than in a risk-free investment.[37] Yields on 30-year Treasury bonds have been in the low 2% range during this case.[38] Thus, if the PFD's recommended ROE of 9.45% is adopted, that would result in a premium over 30-year Treasury rates of approximately 7.45%. Such a premium would be about 180 basis points higher than the average risk premium since 1986, which is 5.65%.[39]

Thus while the PFD's recommendation represents progress compared to SWEPCO's current ROE, it does not go far enough to reflect the reality of today's low-cost capital market. Indeed, even Mr. Gorman's recommended 9.15% ROE would result in an implied equity risk premium of approximately 7.15%,[40] which is still far higher than the above-cited historical average.

In sum, the evidence shows that SWEPCO's cost of capital is low and has declined substantially since its last rate case. The Commission should adopt Mr. Gorman's recommended 9.15% ROE to provide SWEPCO's shareholders with a reasonable return that is commensurate with the risks SWEPCO faces.

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[37] *See* TIEC Ex. 3, Gorman Dir. at 14 ("The difference between the authorized return on common equity and the Treasury bond yield is the risk premium," and stating that the risk premium model "is based on the principle that investors require a higher return to assume greater risk."); *Id.* at 43 ("The equity risk premium should reflect the relative market perception of risk today in the utility industry.").

[38] SWEPCO stated in a discovery response that the average 30-year Treasury yield during the pendency of this proceeding has been 1.87%. TIEC Ex. 46. The 30-year Treasury yield at the time of the hearing was 2.3%. Tr. at 1025:7-10 (Gorman Cross) (May 24, 2021).

[39] TIEC Ex. 3, Gorman Dir. at Exhibit MPG-12.

[40] 9.15% (Mr. Gorman's recommendation) – 2% (approximate range of Treasury yields discussed above) = 7.15%.

VII. EXPENSES [PO ISSUES 1, 14, 24, 25, 27, 29, 30, 32, 33, 34, 35, 40, 41, 42, 44, 45, 46, 49, 72, 73, 74]

A. Transmission and Distribution O&M Expenses

6. Allocated Transmission Expenses Related to Retail Behind-the-Meter Generation

a. Parties' Positions

TIEC supports the ALJs' rejection of SWEPCO's proposal to shift $5.7 million in transmission costs from Arkansas and Louisiana customers to Texas customers. This shift resulted from SWEPCO's attempt to add to the Texas jurisdictional demands the self-supplied electricity of a single one of its hundreds of customers with behind-the-meter generation (BTMG) load when performing the jurisdictional allocation of transmission costs.[41] SWEPCO arbitrarily included that Texas customer's retail BTMG load in its jurisdictional allocation study, but did not include the same load of any similar customers in Arkansas or Louisiana.[42] That inclusion of a single customer's self-supplied load unfairly shifted approximately $5.7 million of SWEPCO's total company transmission revenue requirement from Arkansas and Louisiana to Texas.[43]

Based on SPS's response to discovery requests, it initially appeared that this $5.7 million was the additional amount SWEPCO paid to SPP based on its interpretation of a FERC tariff.[44] At the hearing, however, it became apparent that the $5.7 million was not based on additional payments to SPP, but included both SPP and non-SPP charges and was simply the result of the singling out of one Texas customer's self-supplied electricity for addition to the jurisdictional allocators for all transmission costs.[45] Accordingly, the issue of the tariff interpretation became moot and the critical issue was the arbitrary shifting of transmission costs to Texas customers. The PFD properly rejects that cost-shifting to Texas customers.

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[41] PFD at FoF 226.

[42] Tr. at 1212:8-1213:4 (Aaron Cross) (May 25, 2021).

[43] TIEC Ex. 74.

[44] TIEC Ex. 76.

[45] *See* Tr. at 1210:22-1213:8 (Aaron Cross) (May 25, 2021).

While the PFD reaches the correct decision on the disallowance of this proposed cost shift, it includes broad dicta on an issue that is unnecessary to the decision and that could be read to impose a new limit on the Commission's authority in the future. That dicta could be read to require the Commission to accept patently erroneous interpretations of FERC tariffs put forth by a utility, even if that interpretation is contrary to the explicit language of a FERC tariff and even if the PUC Staff and intervenors point out the erroneous interpretation in testimony. Essentially, it would turn the PUC's obligation to give effect to FERC-approved tariffs into an obligation to ignore the actual terms of the FERC tariff if the utility says that the tariff means something else. TIEC submits that giving carte blanche to utilities on FERC tariff interpretation is inconsistent with PUC precedent and applicable law. But more importantly, it is completely unnecessary to the PFD's recommendation to reject SWEPCO's attempt to shift $5.7 million to Texas customers. Accordingly, TIEC recommends the deletion of dicta in the PFD related to: (1) the Commission's ability to interpret FERC-approved tariffs; and (2) whether SWEPCO's payments to SPP are reasonable as a matter of law even if they are inconsistent with the explicit terms of the FERC tariff.

The PFD includes dicta stating that the PUC may not interpret the SPP Open Access Transmission Tariff (OATT).[46] That statement ignores the fact that the Commission has no choice in some cases but to adopt *some* interpretation of a FERC tariff in order to give effect to the actual terms of that tariff. The choice is whether to adopt the utility's interpretation—no matter how wrong it may be—or an interpretation put forth by the PUC Staff and/or intervenors that is clearly consistent with the FERC tariff.

That dicta is also contrary to the Fifth Circuit's holding in *Entergy Texas, Inc. v. Nelson*.[47] In that case, the Commission recognized that that "[t]he filed-rate doctrine requires that interstate power rates filed with FERC or fixed by FERC be given binding effect by state utility commissions

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[46] PFD at 193 ("The Commission, however, is not the proper forum for resolving the OATT's meaning.")

[47] 889 F.3d 205 (5th Cir. 2018).

determining intrastate rates."[48] But the Commission still interpreted the FERC-approved tariff at issue—the "Entergy System Agreement" (the Tariff)[49]—even though the Commission's interpretation was at odds with that of the utility. Rather than strike down the Commission's interpretation of the Tariff because the Commission "is not the proper forum" to resolve its meaning, the Fifth Circuit held that the Commission's interpretation of that Tariff was correct and that "[t[he PUCT order is not . . . preempted. Rather, it is enforceable."[50]

If the Commission were unable to interpret FERC orders, as the PFD argues, it could not give binding effect to the rates fixed by FERC[51] as required by the filed-rate doctrine.[52] The PFD's conclusion that the PUC may not interpret the OATT runs counter to both the filed-rate doctrine and *Nelson*, and the Commission should not adopt the PFD's dicta that the Commission is powerless to give effect to the actual terms of a FERC-approved tariff, rather than a patently erroneous misinterpretation by the utility.

It should be noted that TIEC is not seeking to have the Commission adopt its position on the meaning of the FERC tariff at issue, nor to overturn the PFD's decision not to interpret the tariff. The resolution of the FERC tariff issue is completely unnecessary to the PFD's recommendation in this case. TIEC only seeks the elimination of dicta that could work mischief in future cases in which the Commission is called upon to interpret and apply the actual terms of a FERC tariff.

TIEC also excepts to dicta claiming that SWEPCO is obligated to pay SPP for charges that SPP bills to it and that such payments are reasonable as a matter of law, whether or not they are

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[48] *Application of Entergy Texas, Inc. to Implement an Interim Fuel Refund Net of Bandwidth Calculation Payments*, Docket No. 42730, Final Order at CoL 5 (Jan. 6, 2016).

[49] *Entergy Texas, Inc. v. Nelson*, 889 F.3d 205, 207-208 (5th Cir. 2018) (citing Entergy Louisiana, Inc., 539 U.S. at 42, 123 S. Ct. at 2053, which explains that the System Agreement is "a tariff approved by FERC.").

[50] *Nelson*, 889 F.3d 205, 217.

[51] It is not possible to give binding effect to a document without first interpreting it to know what one should effectuate.

[52] *See* PFD at CoL 34 (citing *Entergy Louisiana, Inc. v. Louisiana Pub. Serv. Comm'n*, 539 U.S. 39, 47 (2003)).

actually consistent with the terms of the FERC tariff.[53] A simple example illustrates the fallacy of this approach. If, hypothetically, an SPP employee intended to bill SWEPCO $1,000,000 for some charge pursuant to the SPP OATT but accidentally added an additional 0 at the end of the bill, bringing the total to $10,000,000, SWEPCO's payment of the additional $9 million would not be reasonable. Such a payment would also not be in accordance with the Final Order in D. No. 42448, which held that "[u]nder the filed rate doctrine, proof that the SPP charges included in the approved transmission charges were billed to and paid by SWEPCO *pursuant to the SPP OATT* demonstrates the reasonableness of the charges for retail ratemaking purposes as a matter of law."[54] Yet, the broad dicta in the PFD could be read to require that this erroneous payment—which was not at all "pursuant to the SPP OATT"—be included in Texas retail rates. TIEC urges the Commission not to adopt the dicta concerning this issue.

For the above reasons, TIEC urges that the Commission clarify in its order that it is not adopting the dicta on pages 192 to 194 of the PFD relating to the Commission's authority to make a determination of the actual meaning of FERC tariffs that it is obligated to apply.

E. Purchased Capacity Expense

2. Wind Contracts

As utilities propose more and more renewable purchased power agreements (PPAs), it becomes more and more important to ensure that the costs of those PPAs are allocated in a manner that accurately reflects their value and is fair to all ratepayers. In this case, SWEPCO had four wind PPAs under which it incurred costs during the test year.[55] It is undisputed that these contracts have SPP accredited capacity value, and that SWEPCO considers that capacity value in its system planning.[56] Nevertheless, SWEPCO recovers 100% of the costs of these contracts on an energy

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[53] PFD at 194.

[54] *Application of Southwestern Electric Power Company for Approval of Transmission Cost Recovery Factor*, Docket No. 42448, Final Order at CoL No. 18 (Nov. 24, 2014) (emphasis added) (citing *Mississippi Power & Light Co. v. Mississippi ex rel. Moore*, 487 U.S. 354, 373 (1988)).

[55] TIEC Ex. 4, LaConte Dir. at 23-24.

[56] Id. at 23-24; Tr. at 663:15-18 (Stegall Cross) (May 21, 2021); TIEC Ex. 28.

basis (through the fuel factor), and 0% of the costs on a demand basis (through base rates).[57] TIEC respectfully excepts from the PFD's recommendation to continue this treatment, which ignores the capacity value that these wind projects provide.

Under the Commission's rules, capacity- or demand-related costs are not eligible fuel expenses.[58] While the wind PPAs contain only per MWh charges, Commission precedent is clear that it is appropriate to impute capacity costs to PPAs without a separately stated capacity charge ***if those PPAs provide capacity value***.[59] Indeed, the Commission has imputed capacity costs to PPAs without an explicitly stated capacity charge on numerous occasions.[60]

The evidence shows that this treatment is appropriate here. SWEPCO's wind PPAs provided a total of [redacted] MW SPP accredited capacity during the test year.[61] SWEPCO includes these wind projects as capacity resources in its system planning, and they are used to meet SWEPCO's SPP margin requirement.[62] Indeed, at the hearing, SWEPCO's witness candidly admitted that these contracts provide capacity value to SWEPCO:

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[57] SWEPCO Ex. 47, Rebuttal Testimony of Jason M. Stegall at 11 (Stegall Reb.).

[58] 16 T.A.C. § 25.236(a)(6).

[59] *E.g., Application of Entergy Gulf States, Inc. for the Authority to Reconcile Fuel Costs*, Docket No. 23550, Final Order at 2-3 (Aug. 2, 2002) ("There is credible evidence to support a determination that these "energy-only" contracts have a capacity value, despite the fact that EGSI [Entergy Gulf States, Inc.] negotiated the contracts without a separately stated capacity charge.").

[60] *Id;* See, e.g., *Joint Application of Texas Genco, LP and CenterPoint Energy Houston Electric, LLC to Reconcile Eligible Fuel Revenues and Expenses Pursuant to SUBST. R. 25.236*, Docket No. 26195, Order at 7-8 (May 28, 2004); *Application of Central Power and Light for Authority to Reconcile Fuel Costs*, Docket No. 27035, Order on Rehearing at 5-6 (Jun. 3, 2005); *Application Of Entergy Gulf States, Inc. for Authority to Reconcile Fuel Costs*, Docket No. 29408 Order at 14-15 (April 5, 2005); *see also City of El Paso v. Pub. Util. Comm'n of Tex.*, 344 S.W.3d 609, 619-22 (Tex. App.—Austin 2011, no pet.); *Entergy Gulf States, Inc. v. Pub. Util. Comm'n of Tex.*, 173 S.W.3d 199, 211-12 (Tex. App.—Austin 2005, pet. denied).

[61] TIEC Ex. 4, LaConte Dir. at 23.

[62] *See, e.g.*, Tr. at 673:13-674:5 (Stegall Cross) (May 21, 2021).

Q. Okay, sir. But the reality is that you do get some capacity value out of these contracts. Right?

A. We do get some value — capacity value out of these contracts.[63]

Nevertheless, SWEPCO recovers all of the costs of these projects through fuel on an energy basis.

To address this discrepancy, TIEC witness Billie LaConte proposes that the capacity-related portion of the PPAs be removed from the fuel factor and imputed as base-rate expenses.[64] To quantify the amount of capacity that should be imputed to the PPAs, TIEC used the amount that SPP accredits for these wind resources and that SWEPCO includes when conducting system planning.[65] Thus, TIEC's proposal recognizes that these are intermittent resources, and would classify only a fraction of their nameplate capacity rating ([redacted] of 470 MWs) as imputed capacity.[66] For the cost of capacity, TIEC used the avoided cost of capacity in the Commission's energy efficiency cost recovery factor (EECRF) rule to calculate performance bonuses.[67] Multiplying this cost of capacity by the amount of SPP-accredited capacity for the test year resulted in [redacted] million of imputed capacity costs.[68] To be clear, TIEC is not recommending that these costs be disallowed, but rather that they be added to SWEPCO's base rates in this proceeding, and that the same amount be removed from SWEPCO's fuel costs beginning on the effective date of rates in this case.[69]

In opposing TIEC's proposed imputed capacity adjustment, SWEPCO and OPUC relied heavily on the fact that these wind projects have been treated as energy-only in the past.[70] However, parties' understanding of how rapidly proliferating renewable PPAs should be allocated

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[63] Tr. at 669:7-10 (Stegall Cross) (May 21, 2021).

[64] TIEC Ex. 4, LaConte Dir. at 24-26.

[65] *Id.* at 23-24; Tr. at 663:15-18 (Stegall Cross) (May 21, 2021); TIEC Ex. 28.

[66] TIEC Ex. 4, LaConte Dir. at 23-24.

[67] *Id.* at 25. TIEC's calculation also adjusts this avoided cost down to account for an ancillary services provided by the wind projects. The resulting capacity value is $6.58/kW per month. *Id.* at 25-26.

[68] *Id.* at 26.

[69] *Id.*

[70] PFD at 245.

is evolving, and the issue of whether a portion of these wind contracts should be considered capacity related has not previously been contested. In any event, the Commission should decide the issue based on the evidence in this case. And as set out above, and as SWEPCO itself admits, these contracts do provide capacity value.

CARD also disagrees with TIEC's calculation of imputed capacity value, though its arguments are misplaced.[71] As an initial matter, TIEC notes that CARD agreed in its briefing in this case with the concept of imputing capacity wind PPAs, stating:

> To the extent the imputed costs are reasonably quantified, consistently and equitably allocated to customers, and reasonably reflective of costs and benefits of wind energy resources, CARD does not disagree with the concept of imputing capacity charges for wind energy PPAs and recovering such amounts through base rates. Similarly, CARD does not disagree with TIEC's use of the SPP's accredited capacity rating of SWEPCO's Wind PPAs [redacted] as the basis for calculating the imputed capacity value effective with the date imputed capacity costs are reflected in base rates.[72]

CARD's complaint with TIEC's calculation is with the value of capacity that TIEC assumed.[73] However, as explained above, TIEC used the avoided cost of capacity that the Commission has set by rule for evaluating the cost-effectiveness of energy-efficiency programs.[74] Thus, contrary to CARD's concern that this method is "untested,"[75] the Commission uses it when setting performance bonuses for utilities in annual EECRF proceedings.[76] In other words, this is a measure of capacity value that the Commission uses on a regular basis to make ratemaking decisions. Further, CARD's contentions that this value of capacity is too high are based on stale integrated resource plans (IRPs) that do not account for SWEPCO's recently announced

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[71] PFD at 247.

[72] CARD In. Br. at 63-64.

[73] *Id.* at 64-65.

[74] 16 T.A.C. § 25.181(d)(2).

[75] PFD at 248.

[76] TIEC Ex. 4, LaConte Dir. at 25.

retirements.[77] And SWEPCO has confirmed in discovery in this case that it projects that it will need to add capacity beginning in 2023.[78] CARD also relies on a "market value of capacity" for SWEPCO despite the fact that SPP has no capacity market.[79] CARD's complaints with using an existing measure of capacity value that is found in the Commission's own rules are unavailing.

For the foregoing reasons, TIEC requests that the Commission impute [redacted] million in capacity costs to the wind PPAs, add that amount to SWEPCO's base rate revenue requirement, and order that the same amount be removed from SWEPCO's fuel costs on the effective date of the rates set in this case.

XIII. OTHER ISSUES [INCLUDING BUT NOT LIMITED TO PO ISSUES]

A. Impact of Appeal of PUC Docket No. 40443

After the instant case was briefed to the State Office of Administrative Hearings, the Austin Court of Appeals issued its opinion in the appeal of a prior SWEPCO rate case, Docket No. 40443, in *Texas Industrial Energy Consumers, et. al. v. Public Utility Commission of Texas and Southwestern Electric Power Company*.[80] The court's decision implicates the rates to be established in this proceeding by holding that the cost cap on one of SWEPCO's plants, the Turk plant, includes Allowance for Funds Used During Construction (AFUDC).[81] In Docket No. 40443, the Commission held that the cost cap does not apply to AFUDC, and on that basis allowed AFUDC amounts over the cap to be included in rate base.[82]

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[77] TIEC's In. Br. at 63.

[78] TIEC Ex. 31; Tr. at 666:19-667:20 (Stegall Cross) (May 21, 2021); *see also* 1109:10-1111:14 (Norwood Cross) (May 25, 2021).

[79] CARD's In. Br. at 65; TIEC's In. Br. at 63; Tr. at 1111:19-1112:20 (Norwood Cross) (May 25, 2021).

[80] No. 03-17-00490-CV, 2021 WL 3518884 (Tex. App.—Austin Aug. 11, 2021). Attached hereto as Attachment A.

[81] *Id.* at 11.

[82] *Application of Southwestern Electric Power Company for Authority to Change Rates and Reconcile Fuel Costs*, Docket No. 40443, Order on Rehearing at 9-10 (March 6, 2014).

TIEC submits that it would be appropriate to reflect the impact of the Court's decision in this case. That impact can be quantified based on information in the record and prior Commission orders. By way of background, Docket No. 40443 was the first case in which Turk plant investment was placed into rate base, and the Commission calculated that the cost cap, on a Texas retail basis, is $364.93 million.[83] The Commission determined that SWEPCO's investment in the Turk plant as of that case was below the cost cap, but that was only because the Commission concluded that the cap did not apply to AFUDC.[84] Had the cost cap been construed as applying to AFUDC, SWEPCO would have been over the cap when the Turk plant was first included in rate base.[85] Accordingly, in determining the amount of Turk plant investment that should be included in rate base in this case, the Commission should use the capped amount ($364.93 million) as the gross plant in service and reduce that amount by accumulated depreciation since the plant went into service. As shown on a calculation TIEC has attached to this brief as Attachment B.

Moreover, because the amount of Turk plant investment in rate base should be reduced, the annual depreciation expense should also be reduced. Specifically, the annual depreciation expense associated with the Turk plant investment should be $6.73 million, as shown on Attachment B.

The alternative to implementing the Austin Court's decision in this case is to allow the appellate process to reach its conclusion before implementing the court's decision on the cost cap. However, given the potential for large and ever-accruing refunds if the rates set in this case do not reflect the court's decision, TIEC respectfully requests that the Commission implement the above-described changes to SWEPCO's rate base and depreciation expense in this case.

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[83] Docket No. 40443, Order on Rehearing at 10.

[84] *Id.* ("The Commission finds that SWEPCO's share of total construction costs of $1.106 billion, less the relatively small reductions identified in this order on rehearing, does not exceed SWEPCO's share of the cost cap ($1.116 billion) and should be included in rate base. ***Additionally, SWEPCO's share of the roughly $250 million in AFUDC should also be included in rate base because the Commission finds that the AFUDC was not intended to be included in the cost cap.***") (emphasis added).

[85] *Id.* at 9-10.

XIV. CONCLUSION

TIEC respectfully requests that the Commission modify the PFD's recommendations as discussed above and grant TIEC all other relief to which it is justly entitled.

Respectfully submitted,

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ATTORNEYS FOR TEXAS INDUSTRIAL ENERGY CONSUMERS

CERTIFICATE OF SERVICE

I, Christian E. Rice, Attorney for TIEC, hereby certify that a copy of the foregoing document was served on all parties of record in this proceeding on this 7th day of October 2021 by hand-delivery, facsimile, electronic mail and/or First Class, U.S. Mail, Postage Prepaid.

/s/ Christian E. Rice
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SEE TX R RAP RULE 47.2 FOR
DESIGNATION AND SIGNING OF OPINIONS.

Court of Appeals of Texas, Austin.

TEXAS INDUSTRIAL ENERGY CONSUMERS, Cities Advocating Reasonable Deregulation, and Office of Public Utility Counsel, Appellants

v.

PUBLIC UTILITY COMMISSION OF TEXAS and Southwestern Electric Power Company, Appellees

NO. 03-17-00490-CV
|
Filed: August 11, 2021

ON REMAND

FROM THE 200TH DISTRICT COURT OF TRAVIS COUNTY, NO. D-1-GV-14-000536, THE HONORABLE DARLENE BYRNE, JUDGE PRESIDING

Attorneys and Law Firms

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Before Justices Triana, Kelly, and Jones*

MEMORANDUM OPINION

J. Woodfin Jones

***1** This case involves an agency's interpretation of its prior administrative order. In 2014 the Public Utility Commission of Texas issued an order that, among other things, construed an earlier order the Commission had issued in 2008. Texas Industrial Energy Consumers (TIEC), Cities Advocating Reasonable Deregulation (CARD), and the Office of Public Utility Counsel filed suit in Travis County District Court for judicial review of the 2014 Order. Defendants were the Commission and Southwestern Electric Power Company (SWEPCO). The district court affirmed the Commission's Order. This Court reversed and remanded on the basis of a separate issue and did not address the Commission's interpretation of its 2008 Order. The Texas Supreme Court reversed this Court's judgment, affirmed the trial court's judgment as to the issue we had addressed, and remanded the case to this Court to decide the issue we had not addressed. We will reverse the trial court's judgment and remand the case to the Commission for further proceedings.

FACTUAL AND PROCEDURAL BACKGROUND

This case had its genesis in 2007, when SWEPCO applied to the Commission for an amendment to its certificate of convenience and necessity (CCN) to allow it to construct a new coal-fired power plant called the Turk Plant.[1] That proceeding was given PUC Docket No. 33891. In 2008, after a lengthy hearing before the State Office of Administrative Hearings (SOAH), the Commission granted SWEPCO's application but imposed significant conditions and limitations.

The Commission's 2008 Order in Docket No. 33891 conditionally granted SWEPCO's application but placed a cap on the amount of "capital costs" that SWEPCO would later be able to include in its rate base:

> [T]he Commission conditionally grants the CCN for SWEPCO's ownership in the 600 MW Turk Plant on obtaining all of the necessary environmental permits, limits the costs that may be included in ratebase to Texas's jurisdictional allocation of SWEPCO's ownership share of total plant cost of $1.522 billion,[2] and places other limitations and requirements on SWEPCO.
>
> ....

> The cap on the capital costs that Texas retail consumers may be responsible for is the Texas jurisdictional allocation of $1.522 billion.

Following completion of the Turk Plant in 2012, SWEPCO applied to the Commission for permission to change its rates to earn a return on its capital investment in the plant. SWEPCO's application was challenged before the Commission by TIEC, CARD, and others, primarily on the ground that during construction SWEPCO had not properly monitored the economic prudence of completing the project. The final Order in that proceeding, to which the Commission assigned Docket No. 40443, is the subject of this appeal.

***2** After another lengthy hearing before SOAH, the Commission found in Docket No. 40443 that SWEPCO had met its burden of proving that completing the Turk Plant was prudent. In addition, although the issue had not been briefed by the parties, the Commission determined initially that the amount of SWEPCO's construction financing costs, referred to as "allowance for funds used during construction" (AFUDC), was meant to be included in the capital-costs cap imposed by the 2008 Order in Docket No. 33891. On rehearing, however, the Commission reopened the record and admitted additional evidence regarding the capital-costs-cap issue. A majority of the commissioners found that the 2008 Order was

> ambiguous and not conclusive regarding whether the Commission at that time intended to include AFUDC in the $1.522 billion cap on capital costs. Therefore, the Commission looks beyond the order in Docket No. 33891 to the underlying record evidence in that docket.

Subsequently, two of the commissioners reversed their earlier decision and found that AFUDC was not included in the cap:[3]

> In [looking to the underlying record evidence], the Commission finds that the cap was based on estimates of construction costs excluding AFUDC as testified to by parties to that docket. Based on that evidence, the Commission now concludes that the AFUDC was a separately calculated component of capital costs that was not intended to be included in the cap. Accordingly, the Commission determines that the order in Docket No. 33891 did not include AFUDC in the cap on capital costs, and that SWEPCO may recover the Texas jurisdictional share of those costs from ratepayers.

On this basis, the Commission allowed SWEPCO to include AFUDC separately in its rate base, which amounted to approximately $250 million more than would have been allowed if the cap on capital costs had been construed to include AFUDC.

TIEC, CARD, and others filed a suit for judicial review to challenge this Order on both the prudence issue and the capital-costs-cap issue. The trial court affirmed. On further appeal, this Court reversed the Commission's Order based on our holding that SWEPCO had not met the standard the Commission purported to apply, thereby rendering the Commission's decision arbitrary and capricious. *See Texas Indus. Energy Consumers v. Public Util. Comm'n*, 608 S.W.3d 817, 829 (Tex. App.—Austin 2018), *rev'd*, 620 S.W.3d 418 (Tex. 2021). Because that decision resulted in a complete reversal of the Commission's Order, this Court did not address the costs-cap issue. *Id.* at 829 n.14. On further appeal, the Texas Supreme Court reversed this Court's judgment, holding that the Commission's prudence decision was supported by substantial evidence. *See Public Util. Comm'n v. Texas Indus. Energy Consumers*, 620 S.W.3d 418, 432 (Tex. 2021). The supreme court remanded the case to this Court for consideration of the costs-cap issue. *Id.*

DISCUSSION

The single narrow issue remaining for decision here is whether the cap on "capital costs" in the Commission's 2008 Order in Docket No. 33891 was intended to include AFUDC. This required the Commission, in the 2014 proceeding, to interpret its 2008 Order. The Commission's 2014 Order in Docket No. 40443 concluded on rehearing that the cap in the 2008 Order did not include AFUDC. TIEC and CARD complain that the 2014 Order was erroneous because the 2008 cap unambiguously included AFUDC.[4] SWEPCO and the Commission argue that the Commission's 2014 Order was correct, both in concluding that the 2008 Order was ambiguous and in concluding that the capital-costs cap in that Order did not include AFUDC.

Rules of Interpretation

***3** Courts and agencies are required to interpret earlier agency orders using the same rules that are used to construe statutes. *See, e.g., L & G Oil Co. v. R.R. Comm'n*, 368 S.W.2d 187, 193 (Tex. 1963) ("Rules and orders of the Railroad Commission made under authority of a statute are considered under the same principles as if they were the acts of the Legislature...."); *Office of Pub. Util. Couns. v. Texas-New*

Mexico Power Co., 344 S.W.3d 446, 450–51 (Tex. App.—Austin 2011, pet. denied) ("In construing orders of an administrative agency, we apply the same rules as when we interpret statutes."); *Boswell v. Brazos Elec. Power Co-op., Inc.*, 910 S.W.2d 593, 599 (Tex. App.—Fort Worth 1995, writ denied) ("Rules of statutory construction apply equally to the construction of an administrative order."); *Airport Coach Serv., Inc. v. City of Fort Worth*, 518 S.W.2d 566, 574 (Tex. Civ. App.—Tyler 1974, writ ref'd n.r.e.) ("The same rules apply to the construction of [an] order of an administrative agency as those applied to the construction of statutes.").

The construction of a statute is a question of law that courts review de novo. *Texas Lottery Comm'n v. First State Bank of DeQueen*, 325 S.W.3d 628, 635 (Tex. 2010); *see also Davis v. Morath*, 624 S.W.3d 215, 221 (Tex. 2021) ("[T]he jurisdictional question presented here turns on the meaning of a statute and thus presents a question of law reviewed de novo."). Accordingly, the construction of a prior agency order is likewise a question of law that is reviewed de novo. *See Boswell*, 910 S.W.2d at 599; *Airport Coach Serv.*, 518 S.W.2d at 574.

The Texas Supreme Court has set forth the rules of statutory interpretation on numerous occasions. The legislature's intent must, if possible, be discovered within the language the legislature enacted. *Texas Health Presbyterian Hosp. of Denton v. D.A.*, 569 S.W.3d 126, 135-36 (Tex. 2018). When text is clear and unambiguous, it is determinative of intent. *TIC Energy & Chem., Inc. v. Martin*, 498 S.W.3d 68, 74–75 (Tex. 2016). If the statute's words are unambiguous, that ends the inquiry. *Agar Corp., Inc. v. Electro Cirs. Int'l, LLC*, 580 S.W.3d 136, 147 (Tex. 2019). Courts must construe a statute as a whole. *Youngkin v. Hines*, 546 S.W.3d 675, 680 (Tex. 2018) ("[L]egislative intent derives from an act as a whole rather than from isolated portions of it.").

Courts may not rely on extrinsic aids to construe statutory language unless the language is ambiguous. *Texas Health Presbyterian Hosp.*, 569 S.W.3d at 135. Nor may extrinsic aids to interpretation be used to *create* an ambiguity. *Id.* at 133 n.8.

Moreover, "we look to and rely on the plain meaning of a statute's words as expressing legislative intent unless a different meaning is supplied, is apparent from the context, or the plain meaning of the words leads to absurd or nonsensical results." *El Paso Educ. Initiative, Inc. v. Amex Props, LLC*, 602 S.W.3d 521, 531 n.50 (Tex. 2020) (quoting *Cadena Comercial USA Corp. v. Texas Alcoholic Beverage Comm'n*, 518 S.W.3d 318, 325 (Tex. 2017)).

The interpretation must come from the words that were used, not from language that someone later says should have been used:

> Construing clear and unambiguous statutes according to the language actually enacted and published as law—instead of according to statements that did not pass through the law-making processes, were not enacted, and are not published as law—ensures that ordinary citizens are able to rely on the language of a statute to mean what it says.

Molinet v. Kimbrell, 356 S.W.3d 407, 414 (Tex. 2011); *see also Texas Health Presbyterian Hosp.*, 569 S.W.3d at 137 ("Ultimately, our responsibility is to construe the language the legislature enacted, not to determine what the legislature or any individual legislators may have meant to enact.").

***4** Because these same rules of statutory interpretation also apply to the interpretation of an agency order, the Commission's intent in the 2008 Order must, if possible, be discovered within the language of the Order itself. "It matters not what someone thinks the [Order] may have meant to say or now hopes or wishes it said." *Entergy Gulf States, Inc. v. Summers*, 282 S.W.3d 433, 445 (Tex. 2009) (Hecht, J., concurring).

SWEPCO argues that the Commission's interpretation of the 2008 Order is entitled to deference. But an agency's interpretation of a statute is given deference or "serious consideration" by the courts only when the statute is ambiguous. *Combs v. Health Care Servs. Corp.*, 401 S.W.3d 623, 630 (Tex. 2013) ("It is true that courts grant deference to an agency's reasonable interpretation of a statute, but a precondition to agency deference is ambiguity...."); *see also Davis*, 624 S.W.3d at 222 ("[S]tatutory ambiguity is a precondition to any such 'serious consideration.' "). Accordingly, the same rule applies to the interpretation of an agency order: deference is given only when the order being interpreted is ambiguous.

In Docket No. 40443 the Commission found that the 2008 Order was ambiguous regarding the question of whether the cap on capital costs included AFUDC. In interpreting the 2008 Order, however, including its determination that the Order was ambiguous, the Commission in Docket No. 40443 considered and placed great weight on factors outside the words of the Order. Concluding that the 2008 Order was ambiguous, the 2014 Order expressly stated that the

Commission "looks beyond the order in Docket No. 33891 to the underlying record evidence in that docket."

The question of whether ambiguity exists is a question of law that is reviewed de novo. *URI, Inc. v. Kleberg County*, 543 S.W.3d 755, 763 (Tex. 2018).

SWEPCO argues that we should interpret the 2008 Order "in light of surrounding circumstances," including the testimony presented when the Commissioners in Docket No. 40443 reopened the evidence and heard testimony about what various individuals believed the 2008 Order meant. In this regard, SWEPCO urges us to follow *Public Utility Commission v. Houston Lighting & Power Co.*, 645 S.W.2d 645 (Tex. App.—Austin 1983, writ ref'd n.r.e.), in which this Court stated that "if we read the Commission's order as though it were a statute, as we must, we are permitted to take into account the circumstances surrounding its enactment. *C.f.* Tex. Rev. Civ. Stat. Ann. art. 5429b–2, § 3.03(2) (Supp. 1982)." *Id.* at 646-47. The authority cited for the quoted statement was the predecessor to the Code Construction Act, now found at section 311.023 of the Texas Government Code. But in the intervening 38 years since the *HL&P* opinion was issued, the supreme court has made it crystal clear that, notwithstanding section 311.023, courts may not use extrinsic interpretation aids in the absence of ambiguity:

> Constitutionally, it is the courts' responsibility to construe statutes, not the legislature's. In fulfilling that duty, we do not consider legislative history or other extrinsic aides [sic] to interpret an unambiguous statute because the statute's plain language most reliably reveals the legislature's intent. We have therefore "repeatedly branded" reliance on extrinsic aids as " 'improper' and 'inappropriate' when statutory language is clear."

***5** *Texas Health Presbyterian Hosp.*, 569 S.W.3d at 136 (footnotes and citations omitted). We therefore decline to follow the quoted statement from the *HL&P* opinion.

Like legislative intent, the intent of the Commission in its 2008 Order must be determined from the words of the Order alone, if possible. Only if the Order is ambiguous may we consider outside factors. Thus, the inquiry into whether the Order is ambiguous is a threshold question of law that must be decided before outside factors, including extrinsic aids to interpretation, may be considered. In that inquiry, therefore, we look solely to the words of the Order.

Thus, in making the threshold determination of whether the 2008 Order is ambiguous regarding whether the cap on capital costs was intended to include AFUDC, we may consider neither the circumstances surrounding its issuance nor other extrinsic aids to interpretation. This means we may not consider the discussions the Commissioners may have had before its issuance or the testimony of witnesses at either the 2008 hearing or the 2014 hearing. The threshold question is whether, looking solely at its words, the 2008 Order is ambiguous as to the capital-costs issue. Only if it is may we then consider extrinsic aids to interpretation or other outside factors.

The 2008 Order

Because the words in the 2008 Order are the basis on which we decide the question of ambiguity, we quote the relevant portions of the Order at length:[5]

> **Order**
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> .... [T]he Commission conditionally approves SWEPCO's application as modified by and subject to the limitations contained in this Order.
>
> ....
>
> **II. Discussion**
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> ....
>
> **A. Wholesale Loads**
>
> **B.**
>
> ....
>
> .... While the Commission determines that the need for the plant has been established, *the finding of need is not made at any cost.* Therefore, the Commission conditionally grants the CCN for SWEPCO's ownership in the 600 MW Turk Plant on obtaining all of the necessary environmental permits, *limits the costs that may be included in ratebase to Texas's jurisdictional allocation of SWEPCO's ownership share of total plant cost of $1.522 billion*, and places other limitations and requirements on SWEPCO.
>
> ....
>
> **C. Conditional Approval**
>
> .... [A]s discussed below, the uncertainties surrounding the cost of this plant are a significant consideration in

the Commission's approval. Because these uncertainties can only increase as one moves out further in time, the Commission concludes that is appropriate and necessary to place further limitations on SWEPCO.

....

C. Limitations

....

.... [T]he Commission finds that SWEPCO's plan to build the Turk Plant is the most reasonable approach to meeting the identified future power needs *given the current estimates for costs. If the projected costs for building and operating this plant were higher, the Commission would be unlikely to find that the plant would provide the necessary benefits to consumers* and would be likely to find that building the plant would place undue risks to the financial standing of the company.

The Commission also recognizes the risks and uncertainties regarding the costs that will be incurred in building and operating the Turk Plant, notwithstanding the amount of costs currently locked-in by contract. Accordingly, *it is appropriate to place certain limits on the costs that may be placed into base rates as part of the Commission's approval of SWEPCO's CCN amendment.*

***6 1. Capital Costs**

The estimated cost of the Turk Plant, with September 2008 as the anticipated start of construction, is $1.522 billion. The Commission determines that *it is unreasonable to expect Texas retail consumers to be responsible for the Texas jurisdictional allocation of any additional costs that exceed $1.522 billion. This cap on the capital costs of the Turk Plant limits the financial risk to Texas ratepayers* arising out of uncertainties identified in the testimony including, but not limited to, the following: increased material and labor costs because of delays; costs as a result of changes in certification or approval of the Turk Plant by other jurisdictions; changes in the currently proposed ownership participation; and additional costs of plant construction, including those associated with the use of ultra-supercritical technology.

....

III. Findings of Fact

....

22. The capital cost of the Turk Plant is estimated to be $1.522 billion.

....

38. The $1.522 billion investment in the Turk Plant and related transmission facilities would have a significant impact on SWEPCO's financial integrity.

39. The cost of the Turk Plant, including associated transmission and Allowance for Funds Used During Construction (AFUDC), would constitute an increase to SWEPCO's total assets of approximately 46% and an increase to rate base of approximately 98%.

40. SWEPCO will use short-term borrowings, long-term debt, retained earnings through dividend reductions, and equity contributions from SWEPCO's parent, AEP, to finance the construction costs.

41. SWEPCO also plans to request recovery of carrying costs on Construction Work in Progress (CWIP) during construction.

....

54. SWEPCO's initial cost estimate of $1.347 billion for the Turk Plant was low because of construction delays. The estimate was updated to be $1.522 billion as of August 31, 2008.

....

V. Ordering Paragraphs

....

2. *The cap on the capital costs that Texas retail consumers may be responsible for is the Texas jurisdictional allocation of $1.522 billion. This limits the financial risk to Texas ratepayers* arising out of uncertainties identified in the testimony including, but not limited to, the following: increased material and labor costs due to delays; costs as a result of changes in certification or approval of the Turk Plant by other jurisdictions; changes in the currently proposed ownership participation; and additional costs of plant construction, including those associated with the use of ultra-supercritical technology.

(All emphases added except for the phrase "*given the current estimates for costs.*")

All parties agree that the 2008 Order intended to place a cap on the amount of "capital costs" that could later be included in SWEPCO's rate base to earn a return from Texas ratepayers. But the Order does not define "capital costs." In this circumstance, we give the words their ordinary meaning, *Smith v. Clary Corp.*, 917 S.W.2d 796, 799 (Tex. 1996), "unless a more precise definition is apparent from the statutory context or the plain meaning yields an absurd result," *Fort Worth Transp. Auth. v. Rodriguez*, 547 S.W.3d 830, 838 (Tex. 2018).

***7** In deciding whether the ordinary meaning of "capital costs" unambiguously includes AFUDC, it is helpful to delve more deeply into the use of those terms and others, as well as to examine some basic concepts of utility accounting. We are assisted in that effort by recent opinions of the Texas Supreme Court.

Ratemaking principles

The rates that a public utility charges the public are governed by the Public Utility Regulatory Act (PURA), which is Title 2 of the Texas Utilities Code. In general, the purpose of the Act is "to assure rates, operations, and services that are just and reasonable to the consumers and to the electric utilities." Tex. Util. Code § 31.001(a); *see also id.* § 36.003(a) ("The regulatory authority shall ensure that each rate an electric utility or two or more electric utilities jointly make, demand, or receive is just and reasonable."). To that end, a utility's rates are based on (1) a reimbursement of expenses and (2) a return on invested capital:

> [A] utility's rates must be set so as to produce revenues equal to the sum of two amounts. One is the utility's "reasonable and necessary operating expenses", including taxes and depreciation. The other is "a reasonable return on its invested capital used and useful in rendering service to the public." That capital is the utility's rate base. Thus, a utility is entitled to rates sufficient to repay its expenses, without a return or profit on those expenses, and to provide a return on the invested capital included in its rate base, without repaying that investment.

Public Util. Comm'n v. Texas Indus. Energy Consumers, 620 S.W.3d 418, 422 n.6 (Tex. 2021) (quoting *Cities for Fair Util. Rates v. Public Util. Comm'n*, 924 S.W.2d 933, 936 (Tex. 1996)).

The Commission is required by statute to allow a utility "a reasonable opportunity to earn a reasonable rate of return":

> In establishing an electric utility's rates, the regulatory authority shall establish the utility's overall revenues at an amount that will permit the utility a reasonable opportunity to earn a reasonable return on the utility's invested capital used and useful in providing service to the public in excess of the utility's reasonable and necessary operating expenses.

Tex. Util. Code § 36.051. The Commission's rules echo this requirement:

> (c) Return on invested capital. The return on invested capital is the rate of return times invested capital.
>
> (1) Rate of return. The commission shall allow each electric utility a reasonable opportunity to earn a reasonable rate of return, which is expressed as a percentage of invested capital....

16 Tex. Admin. Code § 25.231(c)(1) (Pub. Util. Comm'n of Tex., Cost of Service). Thus, the "rate of return" set by the Commission multiplied by the amount of invested capital produces the return on a utility's invested capital.

Operating Expenses

The determination of a utility's operating expenses begins with gathering data from a historical "test year":

> To establish the utility's reasonable and necessary operating expenses, the Commission starts with the utility's actual expenses incurred during a "test year" and then adjusts those expenses for known and measurable changes. 16 Tex. Admin. Code § 25.231(b) (2014) (Pub. Util. Comm'n of Tex., Cost of Service). Allowable expenses include such things as operating expenses, federal income taxes, and employee post-retirement benefits.

***8** *State of Texas' Agencies & Insts. of Higher Learning v. Public Util. Comm'n*, 450 S.W.3d 615, 622 (Tex. App.—Austin 2014), *aff'd in part, rev'd in part on other grounds sub nom. Oncor Elec. Delivery Co. v. Public Util. Comm'n*, 507 S.W.3d 706 (Tex. 2017); *see also Reliant Energy, Inc. v. Public Util. Comm'n*, 153 S.W.3d 174, 183 (Tex. App.—Austin 2004, pet. denied).

The Commission's relevant rule provides in part:

> Allowable expenses. Only those expenses which are reasonable and necessary to provide service to the public shall be included in allowable expenses. In computing an electric utility's allowable expenses, only the electric

> utility's historical test year expenses as adjusted for known and measurable changes will be considered....

16 Tex. Admin. Code § 25.231(b). PURA defines "test year" to mean "the most recent 12 months, beginning on the first day of a calendar or fiscal year quarter, for which operating data for a public utility are available." Tex. Util. Code § 11.003(20).

Invested Capital

Section 36.051 of PURA provides that a utility is permitted to earn a return only on its "invested capital":

> In establishing an electric utility's rates, the regulatory authority shall establish the utility's overall revenues at an amount that will permit the utility a reasonable opportunity to earn *a reasonable return on the utility's invested capital* used and useful in providing service to the public in excess of the utility's reasonable and necessary operating expenses.

Id. § 36.051 (emphasis added).

Section 36.053 of PURA, titled "Components of Invested Capital," provides:

> (a) Electric utility rates shall be based on the original cost, less depreciation, of property used by and useful to the utility in providing service.
>
> (b) The original cost of property shall be determined at the time the property is dedicated to public use, whether by the utility that is the present owner or by a predecessor.

Id. § 36.053(a), (b). Thus, "invested capital" consists primarily of the cost of plant, property, and equipment: "The rate base, sometimes referred to as invested capital, includes as a major component the original cost of plant, property, and equipment, less accumulated depreciation, used and useful in rendering service to the public." *Texas Indus. Energy Consumers*, 620 S.W.3d at 422 n.6 (quoting 16 Tex. Admin. Code § 25.231(c)(2)).

> A utility's cost of constructing a facility for use in providing service is ordinarily not an operating expense; obviously, until the facility is completed, there is nothing to operate. Rather, the cost of constructing a new facility, like the purchase price of an existing facility, is an investment of capital in an asset to be used in the future. As such, it must be included in a utility's rate base, but not until the facility has become "used and useful in rendering service to the public."

Cities for Fair Util. Rates, 924 S.W.2d at 935.

As stated by the authorities cited above, in the ordinary circumstance "construction costs are not included in rate base until construction is complete. Meanwhile, they are accrued in an account for construction work in progress, or CWIP, for short." *Id.* Only in extraordinary circumstances may CWIP be included in a utility's rate base before construction is complete:

> ***9** [I]f costs of capital and construction are high, and construction periods are lengthy, the funds "advanced"—actually expended by a utility—can be so large over so long a time that they cause the utility serious cash flow problems. Expenditures may become enormous before any return at all is realized.... To accommodate a utility's real financial difficulties, and still preserve an accounting procedure historically viewed as fair to present and future utility customers, regulators began to allow CWIP to be included in the rate base before completion of construction, but only when it was necessary for the financial integrity of the utility.

Id. at 936. This standard is reflected in PURA:

> Construction work in progress, at cost as recorded on the electric utility's books, may be included in the utility's rate base. The inclusion of construction work in progress is an exceptional form of rate relief that the regulatory authority may grant only if the utility demonstrates that inclusion is necessary to the utility's financial integrity.

Tex. Util. Code § 36.054(a).

The cost of constructing a new plant includes financing costs, i.e., the interest on money borrowed or used by the utility for construction of the plant. This is referred to as "allowance for funds used during construction," or AFUDC:

> The cost of the capital used to pay construction costs is also part of the investment in the facility. Recognizing this, uniform accounting rules adopted by the Federal Power Commission in 1937 and followed in most states allowed a utility to include in its cost accounting an amount for "interest during construction." In 1971 the FPC substituted the phrase "allowance for funds used during construction," or AFUDC, for interest, but the basic idea remained the same. AFUDC is now part of FERC's uniform accounting system. While construction is continuing, AFUDC accrues on CWIP. AFUDC does not represent a transfer of funds; it is simply an entry in a utility's books to indicate the cost of capital used during construction.

Cities for Fair Util. Rates, 924 S.W.2d at 935 (citations omitted). Thus, "AFUDC refers to the 'carrying costs' used to finance a long-term construction project." *Texas Indus. Energy Consumers*, 620 S.W.3d at 422 n.5.

Like CWIP, AFUDC is normally accrued during construction and then added to the utility's rate base after construction is complete and the new plant becomes "used and useful": "When construction is complete and the facility operational, both CWIP and AFUDC are transferred to the utility's rate base, and the utility begins to earn a return on its investment in both." *Cities for Fair Util. Rates*, 924 S.W.2d at 935-36.

As described by Professor Bonbright, "[t]he primary purpose of AFUDC is to capitalize the costs of financing construction, separate the effects of the construction program from current operations, and to allocate current capital costs to future periods when these capital facilities are producing revenue." James C. Bonbright, et al., *Principles of Public Utility Rates* 242 (2d ed. 1988).

From these authorities it is beyond dispute that AFUDC is part of the capital cost of plant construction. Indeed, even SWEPCO concedes in its brief that "[i]t is true that AFUDC is typically treated as a cost to be capitalized and included in rate base." SWEPCO attempts to get around this fact by arguing that we should go behind the words of the 2008 Order to find its true meaning. That we may not do, however, in the absence of ambiguity.

In its brief, SWEPCO offers this interesting analogy: a speaker who uses the term "animal" may not be intending to include dogs within that term, as could be discerned from background information. That may be true as far as it goes, but applying the rules of interpretation set forth above would allow us to reach that conclusion only if the text of the statute or order itself so indicated. If, for example, a statute prohibited "animals" from restaurants, but other parts of the statute implied that the use of the term "animals" in the relevant statutory provision was intended to refer only to pigs and cows, then the term "animals" could well be considered ambiguous, which would then allow consideration of outside factors, including extrinsic aids to interpretation. By itself, however, the term "animals" is not ambiguous. So if our hypothetical statute did nothing more than prohibit "animals" from restaurants, there would be no ambiguity. Standing alone, the term "animals" unambiguously includes dogs. The result would be the same even if there were evidence that preliminary testimony or discussions among legislators seemed to revolve only around pigs and cows, because in determining whether the statutory term "animals" was ambiguous we would be permitted to consider only the words of the statute. That is the situation here.

Construing the 2008 Order as a Whole

***10** SWEPCO argues that the 2008 Order itself, construed as a whole, shows that the Commission did not intend for the cap on "capital costs" to include AFUDC. The portions of the Order on which SWEPCO relies include the following:

1. SWEPCO argues that the 2008 Order did not expressly state that the cap on capital costs was to include AFUDC. Although this is true, neither did the cap expressly exclude it. And since AFUDC is a recognized element of capital costs or capital investment, the absence of express mention does not show an intent to exclude it. This portion of the Order does not support ambiguity.

2. SWEPCO also argues that the Commission sometimes uses "capital costs" to refer only to "direct construction costs" separate and apart from AFUDC. While SWEPCO offers several examples in which the Commission has previously used "capital cost" in a way that did not include AFUDC, in each instance the Commission was careful to explain that the "capital cost" figure it was using was "excluding AFUDC." If "capital cost" did not ordinarily include AFUDC, there would be no reason for the Commission to expressly note its exclusion. Rather than supporting SWEPCO's position, these examples demonstrate that when the Commission intends for its use of the term "capital costs" *not* to include AFUDC, it so states. This portion of the Order does not support ambiguity.

3. SWEPCO also argues that the $1.522 billion cost estimate on which the cap was based did not itself include AFUDC, much the way a residential homebuilder "provides to the prospective owner an estimate of the cost to build that home or pool, but not an estimate of the prospective owner's financing costs." There are at least three difficulties with this argument. First, SWEPCO's assertion that the $1.522 billion cost estimate did not include AFUDC apparently is derived primarily from testimony at the 2008 and 2014 hearings, which we may not consider. Second, there is no indication in the 2008 Order itself that the $1.522 billion cost estimate on which the cap was based did not include AFUDC. SWEPCO asserts that this number is an estimate of *direct construction costs*—i.e., excluding AFUDC—but the Order itself does not support that narrow reading. Finding of Fact 22 of the Order, for example, simply states that

"[t]he capital cost of the Turk Plant is estimated to be $1.522 billion." Other parts of the Order are similarly general in nature: "total plant cost of $1.522 billion," "[t]he estimated cost of the Turk Plant ... is $1.522 billion," "SWEPCO's initial cost estimate ... was updated to be $1.522 billion," and "[t]he cap on the capital costs that Texas retail consumers may be responsible for is the Texas jurisdictional allocation of $1.522 billion." As the supreme court has stated, "AFUDC is as much a part of a utility's capital investment in a facility as construction costs." *Cities for Fair Util. Rates*, 924 S.W.2d at 942. Accordingly, it cannot be assumed that the Commission meant by the foregoing general language to exclude AFUDC. Third, the 2008 Order repeatedly voiced the Commission's concern regarding the amount of capital investment that could ultimately be included in SWEPCO's rate base and thereafter earn a return from Texas ratepayers. Thus, the 2008 Order implemented the Commission's intent to limit the amount of capital investment that could end up being included in SWEPCO's rate base: "[I]t is appropriate to place certain *limits on the costs that may be placed into base rates* as part of the Commission's approval of SWEPCO's CCN amendment." (Emphasis added.) The Commission is, of course, well aware that AFUDC goes into a utility's rate base just the same as "direct construction costs." The Commissioners' concern being the amount that would be included in SWEPCO's rate base, it is illogical that the Commission would want to put a cap on only *one* type of capital cost. On the contrary, it is reasonable to conclude that the Commission intended for the cap to be on "*any* additional cost" that would be put into SWEPCO's rate base. That would include AFUDC. Because none of the referenced portions of the Order states or implies that AFUDC is to be excluded from the cap, they do not support a conclusion that the Order is ambiguous.

***11** 4. SWEPCO next points to the Commission's statement in the 2008 Order that SWEPCO's plan to build the Turk Plant "is the most reasonable approach to meeting the identified future power needs *given the current estimates for costs.*" (Emphasis in the 2008 Order.) SWEPCO argues that the Commission's emphasis of the last phrase of this statement shows that the cap was intended to apply only to "direct construction costs." We disagree. Since AFUDC is part of the capital cost of building a new plant, the term "costs" would more logically be intended to include AFUDC than to exclude it. In any event, even if the $1.522 billion estimate of "current costs" was based only on direct construction costs (which is not shown in the 2008 Order), the cap appears to have been intended to have a broader impact. The Commission's concern about the impact of the plant's eventual cost on ratepayers supports the conclusion that the Commissioners desired to put a cap on *all costs* that would go into SWEPCO's rate base. That would include AFUDC. This portion of the Order does not support ambiguity.

5. SWEPCO next argues that Finding of Fact 39, with its express reference to AFUDC, supports its position:

> 39. The cost of the Turk Plant, including associated transmission and Allowance for Funds Used During Construction (AFUDC) would constitute an increase to SWEPCO's total assets of approximately 46% and an increase to rate base of approximately 98%.

We see nothing in this language that indicates an intent that AFUDC was to be excluded from the cap on capital costs to be later included in SWEPCO's rate base. In any event, the reason this Finding expressly mentioned AFUDC as being within the costs of the Turk Plant may lie in the fact that other references in the Order to the cost of the plant were to the *overall* cost of building the plant whereas the subject of Finding of Fact 39 was the particular impact the capital investment would have on SWEPCO's assets and rate base. This portion of the Order does not support ambiguity.

6. Finally, SWEPCO argues that a comment by the dissenting Commissioner in 2008 supports its position. The Commissioner's comment was that the cap was a "$1.522 billion construction cost cap." Even if the dissenting Commissioner was not including AFUDC in her reference to "construction cost," however, the comment is not part of the Commission's 2008 Order and therefore is no evidence of the Order's meaning. This comment does not support ambiguity.

CONCLUSION

We conclude first that the terms "invested capital" and "capital costs" are synonymous. They are two names for the same thing. Whichever term one chooses to use, it does not qualify as an operating expense and is ultimately to be included in a utility's rate base to earn a return. And only a capital "cost" or "investment" may be included in a utility's rate base. *See* Tex. Util. Code § 36.051.

Second, we conclude that AFUDC is unambiguously one component of "capital costs." If there could be any doubt about that, the Texas Supreme Court laid it to rest 25 years ago: "AFUDC is as much a part of a utility's capital

investment in a facility as construction costs. AFUDC would be included in rate base on completion of construction, or on a showing of necessity for a utility's financial integrity." *Cities for Fair Util. Rates*, 924 S.W.2d at 942. Giving the phrase "capital costs" its ordinary meaning, the term includes AFUDC.

Third, looking solely at the words of the 2008 Order, we conclude that the cap on "capital costs" was unambiguously intended to include AFUDC. And within the context of the 2008 Order, we are unable to discern a "different or more precise definition apparent from the term's use," nor does assigning the term its ordinary meaning produce an absurd result. Accordingly, we are not permitted to consider extrinsic aids to interpretation or other outside factors such as testimony and discussions that may have preceded the 2008 Order's issuance or the circumstances under which it was issued. In short, our determination that there is no ambiguity in the language of the Order "ends the inquiry." Therefore, we hold that the 2008 Order's cap on capital costs was intended to include AFUDC.

***12** "Agencies are entitled to interpret their own orders, for administrative purposes, so long as the agency does not use the occasion to interpret as a means to amend the prior order." *Office of Pub. Util. Couns. v. Texas-New Mexico Power Co.*, 344 S.W.3d 446, 452 (Tex. App.—Austin 2011, pet. denied) (quoting *Cities of Abilene v. Public Util. Comm'n*, 146 S.W.3d 742, 747 n.7 (Tex. App.—Austin 2004, no pet.)). The effect of what the Commission did here was to amend the 2008 Order.

Pursuant to section 2001.174(2) of the Administrative Procedure Act, we reverse the judgment of the trial court and remand the case to the Public Utility Commission for further proceedings. *See* Tex. Gov't Code § 2001.174(2).

All Citations

Not Reported in S.W. Rptr., 2021 WL 3518884

Footnotes

* Before J. Woodfin Jones, Chief Justice (Retired), Third Court of Appeals, sitting by assignment. *See* Tex. Gov't Code § 74.003(b).

1 For policy reasons related to retail competition among providers of electricity, SWEPCO is still subject to traditional cost-of-service rate regulation. *See* Tex. Util. Code § 39.501.

2 At that time SWEPCO was scheduled to own (and ultimately did end up owning) about 73.3% of the Turk Plant. Because the plant also provides electricity for parts of Louisiana and Arkansas, Texas's "jurisdictional allocation" for plant production is 32.7% of SWEPCO's 73.3%, or approximately $365 million.

3 The third commissioner, the only one who had been on the Commission when the 2008 Order was issued, dissented.

4 The Office of Public Utility Counsel appealed the Commission's 2014 Order to this Court but did not challenge the costs-cap portion of the Order.

5 Footnotes in the Order have been omitted.

End of Document

SOUTHWESTERN ELECTRIC POWER COMPANY
Turk Plant Invested Capital and Depreciation Expense
($000)

Line	Description	Amount
		(1)
	Gross Plant	
1	Cost Cap[1]	$364,930
	Accumulated Depreciation	
2	Depreciation Rate[2]	1.845%
3	In-Service Period[3]	7.28
4	Accumulated Depreciation (L1 x L2 x L3)	$49,016
5	**Net Plant (L1 - L4)**	$315,914
6	**Depreciation Expense (L1 x L2)**	$6,733

1 Docket No. 40443, Order on Rehearing at 10.

2 Docket No. 51415, Rate Filing Package Sch. D-4, page 3, line 137. (SWEPCO Ex. 1).

3 In-service date of December 12, 2012 (Docket No. 40443, Order on Rehearing at FoF 83) through the end of the test year March 31, 2020 (SWEPCO Ex. 4, Brice Direct at 1.)